AUG 25 1944
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 396

NORTHERN PACIFIC RAILWAY COMPANY,
Petitioner,

vs.

KREEDA BIMBERG, SPECIAL ADMINISTRATRIX OF THE ESTATE OF CLIFFORD BIMBERG.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA AND BRIEF IN SUPPORT THEREOF.

W. O. BISSONETT,
L. B. DAPONTE,
FREDERIC D. MCCARTY,
Counsel for Petitioner.

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Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully shows that it seeks herein a review by this Court of the final judgment of the Supreme Court of Minnesota, Court of last resort of that State, affirming a judgment of the District Court of the Eleventh Judicial District, St. Louis County, Minnesota, docketed June 13, 1944, for Six Thousand One Hundred Forty-two Dollars and 53/100 ($6,142.53), in respondent's action under the Federal Employers' Liability Act (35 Stat. 65, c. 149, as amended, 36 Stat. 291, c. 143, 53 Stat. 1404, c. 685; 45 U. S. C. A. c. 2, Sec. 51), to recover damages for injuries to and death of plaintiff's decedent while employed as a bridge carpenter in interstate commerce.

Summary Statement of the Matter Involved.

On October 1, 1941, a bridge crew consisting of a straw boss and four carpenters, including the decedent, all in the employ of the petitioner, proceeded to Iron River, Wisconsin, for the purpose of lining track on a wood trestle bridge which crossed a ravine at that point. The bridge was about 300 feet long and, at the point from which decedent fell, about 40 feet above the level of the ground. Long wooden pilings extended up from the ground on the top of which rested cap timbers placed crosswise. The cap timbers supported wooden stringers extending lengthwise of the bridge, and on the stringers rested the ties, some of which were 10 feet and some of which were 12 feet long. On top of the ties and immediately over the wooden stringers were placed the steel running rails of the track. Every fourth tie was bolted to the stringers upon which it rested. By removing the spikes from the ties that were bolted, the top deck of the bridge, consisting of the running rails, the guard rails, and the ties, could be moved a fraction of an inch at a time by the use of steel lining bars. These steel lining bars were about 4½ feet long, weighed about 28 pounds, and were shaped at one end like a chisel with a flat sharp edge about 1½ inches wide. In the work of lining the track these lining bars were placed under the rails at an angle, resting upon the stringers under the rails. There were two men at each rail and upon a signal from one of them all four men would heave in unison thereby wedging the track in whatever direction it was necessary that it be moved.

The wood trestle bridge carried a single continuous track. Inside this track were placed two steel guard rails designed to prevent trains from leaving the bridge in case of derailment. Near the outer edge on each side of the bridge and running lengthwise of the bridge, was a 6 by 8 wood stringer

called a guard timber, so notched as to fit between the ties and prevent their bunching or spreading.

The ties at the east end of the bridge were 12 feet long but on the section of the bridge on which the crew was working at the time of the accident, they were 10 feet long. The ties were placed on 14 inch centers leaving an open space of from 6 to 7 inches between each tie.

The track across the bridge having been reported to be ½ inch out of line, the crew, of which decedent was a member, was dispatched to Iron River to take the "kink" out of the track. First in order of work was the removal of the spikes from each of the bolted ties, that is every fourth tie. This was done for a distance of about 3 rail lengths from the east end of the bridge. The removal of these spikes permitted the deck of the bridge to be wedged either to the north or south as required. On the day in question the wedging was toward the south. Seeford Swanson, in charge at the time, stood at the east end of the bridge sighting along the rails, while the other four men, each equipped with a lining bar, took positions in a form of a square at the point east to the center of the bridge, two men at each rail. The decedent and John Anderson had their lining bars under the south rail while Floyd Kuru and Myron Johnson had their lining bars under the north rail. Having inserted their lining bars under the rails the four men, at an appropriate signal given by Anderson, heaved simultaneously on their bars, three or four such operations resulting in wedging the deck of the bridge toward the south about ¼ of an inch. On the next operation the decedent's bar apparently slipped, he lost his footing and pitched over the south edge of the bridge to the ground below, thereby sustaining injuries from which he died on October 3, 1941.

The day was clear and the top deck of the bridge was dry. There was nothing broken or in disrepair on the

bridge and no claim is made that the lining bars were defective or unfit for their intended purposes.

Liability of the petitioner was predicated upon (1) its alleged failure to furnish decedent with a safe place to work; (2) its alleged failure to provide safeguards, such as a guardrail, plank walk, fence, or safety belt, against the danger of workmen falling off the bridge; (3) its alleged failure to instruct fellow employees as to the proper manner of doing their work; and (4) alleged negligence of such fellow employees. Only the first two charges of negligence were considered by the Supreme Court of the State of Minnesota.

Reasons Relied Upon for the Allowance of the Writ.

The Supreme Court of Minnesota has decided a Federal question of substance in a way not in accordance with the applicable decisions of this Court, and in that connection error is assigned on questions and reasons presented for the allowance of the writ, as follows:

1. The Supreme Court of Minnesota has apparently, through inadvertence or otherwise, overlooked or ignored the controlling decision in the State of Minnesota which has not been distinguished, modified, or overruled, to-wit: *Hanson* v. *Great Northern Railway Co.*, 128 Minn. 122, 150 N. W. 380, affirmed 242 U. S. 615, 37 S. Ct. 211, 61 L. Ed. 529; and has based its decision upon the case of *Bailey* v. *Central Vermont Ry. Inc.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444, which case is not in point.

2. The Supreme Court of Minnesota has apparently not fully and thoroughly considered the import of its language pertaining to the right of a jury to pass upon questions of liability, where different minds may reasonably arrive at different conclusions, as to the inferences to be drawn from the facts. The language used in effect makes the railroad

company with wood trestle bridges an insurer of the safety of its employees who go thereon, and ignores the fact that a bridge carpenter is the man who keeps such wood trestle bridges in a safe state of repair in order that trains engaged in interstate commerce may go upon and over such bridges without delay or mishap. The language of the opinion to which we refer is as follows:

> "We do not say that the duty to erect guardrails to provide continuous footing, to equip bridge crews with safety belts, or to take safety measures other than those defendant had adopted appears from the record here as a matter of law. The issue of negligence was one of fact, and this, though there may have been no dispute as to general custom and practice, nor as to any of the facts and circumstances surrounding the accident.
>
> The right of a party to a negligence action to have the jury pass upon the question of liability is not limited to cases where facts are in dispute and the evidence conflicting. When the proof discloses such a state of facts, whether controverted or not, that in essaying to fix responsibility for the injury different minds may reasonably arrive at different conclusions or may reasonably disagree as to the inferences to be drawn from the facts, the issue of negligence *vel non* is for the jury."

3. The Supreme Court of Minnesota has apparently overlooked the fact that there was no proof submitted by the respondent that the presence of either temporary or permanent guardrails on the deck of the bridge, longer ties with closer spacing, or safety belts, would or could have prevented decedent falling from the bridge. In other words, there was no proof by respondent that either one or all of these safeguards would have prevented this particular accident.

4. The Supreme Court of Minnesota has apparently overlooked or ignored the fact that the respondent did not prove actionable negligence against the petitioner either under the Federal Employers' Liability Act or otherwise.

WHEREFORE, petitioner, referring to the attached brief in support of its reasons for review, respectfully prays that this Court issue a writ of certiorari directed to the Supreme Court of Minnesota to certify and send to this Court a full and complete transcript of record herein, to the end that the case may be reviewed and determined by this Court as provided by law, and that the decision of the Supreme Court of Minnesota may be reversed; and that the petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and equitable.

And your petitioner will ever pray.

NORTHERN PACIFIC RAILWAY CO.,
By W. O. BISSONETT,
L. B. DAPONTE,
FREDERIC D. MCCARTY,
Counsel for Petitioner.